Petition No. 80-1500

SUPREME COURT OF THE UNITED STATES

October Term 1980

GEORGE CLIPPER,

Petitioner,

v.

GRANT A. STARKEY
And
NATIONAL PERMANENT
SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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For Reply Brief to the Brief in Opposition, Petitioner suggests as follows:

1. The Questions Presented in the "Opposition" are helpful to the points of Petitioner in certain respects. They point up that the first critical issue

is indeed about when "negligence" is "actionable" under the civil rights statutes. (Resp. Brief p. 1.) That concession is then followed by arguing the scope and holding of Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979). It is plain, as we briefly expand upon hereafter, that the Respondents' Opposition to the Petition clearly misreads Baker, omitting that it expressly does not address Fourth Amendment claims.*/

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*/ This Petitioner's main Question Presented noted that the negligence issue he asked to be heard was not decided in Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855 (1978) and was expressly reserved by Baker v. McCollan, supra. We think it very pertinent that almost three weeks after our petition was filed, it was reported this Court heard argument on the negligence issue on March 2, 1981, in the cause known in this Court as Parratt v. Taylor, No. 79-1734. See, Taylor v. Parratt, 620 F.2d 307 (8th Cir. 1980) (unpublished opinion), cert. granted ____ U.S. ____, 101 S.Ct. 315 (1980); argued March 2, 1981, 49 U.S.L.W. 3697 (March 24, 1981). The result of that argument could resolve the issue here or induce the further need for the writ at bar, as we note hereafter.

Respondents' "Questions" and their argument in this regard, however, are helpful not only for this reason --- they wrongly see Baker as dispositive, particularly given the dissent's analysis in Baker and the majority's emphasis in Baker that the issues it addresses are post-arrest and post-detention issues. Their reliance on Baker underscores its unanswered areas, some of which are addressed in its dissent. Since Baker arose from a common situation that is replicated by and similar to many facts at bar, all of which encourage the granting of the writ, we later address its further pertinence in some additional references.

Respondents' "Questions" are also helpful to our second issue involving the selective use of 42 U.S.C. § 1988, for remedial purposes, to employ "the benefits of ... state law without its detriment to aid

in expanding the federal remedy" (Brief in Opposition at page 1). By this, we mean we should be able to reject state procedural impediments but take its substantive benefits, if less restrictive than federal law. Here the benefit of state substantive law is in its holding that deprivations of liberty resting on "false arrest" and "false imprisonment" do not depend on actual intent or good faith and can exist "with or without probable cause." See Great Atlantic and Pacific Co. v. Paul, 256 Md. 643, 261 A.2d 731, 738-40 (1970), cited and considered in the pre-trial order of the trial court below (App. 22), that struck the false arrest and false imprisonment claims at issue.

We urge that under § 1988, viewed in its remedial aspect, one is allowed to reject a procedural "detriment" of state

law but retain the substantive law which expands the remedy. Our state "detriment" is that where there is a warrant, the state procedure converts the liberty deprivation of a false arrest to a malicious prosecution claim. See Brewer v. Mele, 257 Md. 437, 298 A.2d 157, 159 (1972), also cited in the trial ruling below on the issue raised (App. 23-36). Our point, expanded on briefly hereinafter, is that this Court has not but should resolve whether, given the federally created remedy of the civil rights acts, a plaintiff deprived of substantive liberty can synthesize the state substantive law that is most favorable to his claim (here deprivation resting on false arrest claims that do not depend on probable cause), while rejecting state procedural limits to those principles that prevent their application whenever a warrant is merely sought. We note that Prosser on Torts

(4th ed. 1971) appears to make this very distinction clear: false arrest and imprisonment are in "Chapter 2. Intentional Interference with the Person" (Sec. 11). Malicious prosecution appears twenty (20) chapters and 108 sections later in its Chapter 22 under the title "Misuse of Legal Procedure". See Prosser on Torts (4th ed. 1971), Chapter 2 and Sec. 11; Chapter 22 and Sec. 119.

Warrants are irrelevant to substantive deprivations.

In Reply to the observations of Respondents, we not only urge the foregoing. We also suggest that while both the majority and dissent in Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991 (1978) and Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972) arrived at different results, the analyses of the relation between and among the purpose of

§ 1983, federal remedial law, state substantive law and the use of § 1988 there considered, do indeed support our view; at least our view that our § 1988 issue is of sufficient moment to warrant further review and the grant of the writ.

2. As to remaining parts of the Brief in Opposition, particularly some implications not directly clear that neither negligence nor § 1988 were allegedly charged in the complaint and § 1983 was dropped as to the bank, we are compelled to underscore that these implications are not only inaccurate but Respondents carefully avoid the pre-trial order which expressly, clearly and fully alludes to them. If their reference to the complaint was merely intended as an aside (such references were in the complaint as well), it is both inaccurate and made meaningless by the pre-trial order to which we allude hereafter. The fact that § 1983

was dropped as a basis for bank liability does not affect the § 1983 liability of the police officer, Mr. Starkey, a point not really addressed in the Brief in Opposition; and of course it does not affect the bank's § 1985 joint liability.

I.

We have underscored that Respondents misread Baker. Baker, we emphasize, "was based solely on ... actions after respondent was incarcerated," 443 U.S. at 143 (emphasis added). It was not, as here, about the initial arrest and seizure. The claim there was about detention after arrest and whether that detention was unconstitutional, 443 U.S. at 142-143. Our point is that what it did not decide --- a Fourth Amendment claim based on negligence "plus" --- should be decided. Baker expressly stated this as to the negligence issue:

> "[H]aving been around this track once before in Procunier, supra, we have come to the conclusion

> that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush." 443 U.S. at 139.

Baker's majority found, however, that since there was no constitutional deprivation in that case in the post-incarceration claim based on cruel and unusual treatment, that the Court would "defer again consideration of the question whether simple negligence can give rise to § 1983 liability." 443 U.S. at 140. In view of that statement, we find Respondents' reliance on Baker surprising.

The fact is that the Fourth Circuit continues to follow its decision in Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974), on the issue --- the case on which Respondents relied below (Bank's Brief, p. 13).

The Baker majority did observe that not every person who is innocent and wrongfully arrested will automatically have a civil rights constitutional claim:

> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions (note but in Maryland eliminated when there is a warrant), is largely irrelevant to his claim of deprivation of liberty without due process of law (footnote omitted). The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted --- indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights 'without limits.' Patterson v. New York, 432 U.S. 197, 208 (1977). 'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' Ibid. 443 U.S. at 145.

By the same token, it seems no less appropriate to observe, using in part the analytic approach of the dissent in Baker, that merely because an officer may have a claim to probable cause, still, if he fails to use readily available facts of the kind at bar --- a bank photograph of the true culprit --- he should be denied the defense of good faith as a matter of law, or be liable by federal

standards based on negligence or "negligence plus grounds" that do not permit refusal to glance at indisputable facts of innocence immediately at hand. Undeniably, since it is undisputed by virtue of an FBI Stipulation at bar that the bank photographs in our case showing the actual bank robber were available 24 hours before the arrest; and since, if they were examined by the officer or the bank employees involved, this innocent party would have never been arrested, Baker should mean there are some duties that cannot be ignored. If either the photographs were looked at, or the officer (Mr. Starkey) had even made a simple contact with readily available witnesses, including a District of Columbia policeman, or an unimpeachable next door neighbor, the arrest also would not have occurred.

If, as Baker's dicta noted, "not every conceivable step" is required by due process to eliminate convicting the

innocent," it does require a few critical ones to meet a constitutionally permissible defense to a Fourth Amendment violation pursued through § 1983 or § 1985.

The Brief in Opposition argues that Mr. Starkey obtained arrest warrants. So he did; but he did so by not mentioning or seeing the bank pictures showing innocence, or by not telling the magistrate of multiple witnesses never contacted who indisputably saw Mr. Clipper at his home at the time of the robbery.*/ Due to the jury's finding, we arguendo ignore for our purposes, the fact that his "statements" were said by him to be in the form of an affidavit when none existed or that the hearing was not transcribed (since it occurred before magistrates had to be judges). Taking only his admissions and what he states he said, he did not tell the magistrate about what is at issue here --- his negligence regarding the failures to use the

*/ Critical also to recall, and ignored by Respondents was that there was a single picture show-up.

bank photographs or his failure to contact any offered witnesses to confirm that Mr. Clipper was elsewhere at the time of the crime. Even if this indisputable fact were not so, the issue remains: whether --- as a matter of the constitutionally permissible or constitutionally sufficient and not merely the factually sufficient --- a warrant is in itself justification to avoid negligence in § 1983 cases, with or without a one picture showup.

If neither the Constitution nor § 1983 will guarantee that only the guilty will be indicted, each ought to guarantee that a modest effort will be made to find innocence if it is readily available.*/

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*/ There are degrees, of course --- the very reason for the grant of the writ. If, for example, the officer, or employees, had no actual or reasonable notice of the evidence, or if there was a special emergency not involved here, that is one case. Where, however, it is conceded that critical proof is either available or could be available before arrest, and the Respondents are aware of its existence (even if not the exact time it was available), all reflected here in the FBI Stipulation agreed to by both Respondents (App. at 59-61), any negligence in failing to examine it cannot be considered merely careless, as a matter of law; nor may the jury instructions directed to those points be denied, as here. A one picture show-up, as here, should also matter.

These factors apply to the officer under both our § 1983 and constitutional claim. They also apply to the bank under § 1985. It cannot fairly be said that banks and their personnel, who are generally properly trained in dealing with robberies, can be treated as ordinary citizens who are suddenly presented with an unexpected event.

The average citizen does not carry around a portable camera that could identify --- as here incontrovertibly --- one who may assault him.

Banks have those tools available both in fact and in training of their personnel. Therefore, their liability is no less in issue on the same principles applied to Mr. Starkey.

The Brief in Opposition simply does not address this obvious fact.

Nor does it address meaningfully the constitutional effect of the show-up procedure or even that it is at least negligent.

II.

We have already observed that this Court recently heard oral argument in another case involving an unpublished opinion regarding negligence, Parratt v. Taylor, No. 79-1734, whose argument was reported in 49 U.S.L.W. 3697 (March 24, 1981). That case and its result is a still further reason for the grant of the writ either because it may resolve our issue or because we reach what it does not, depending on its result.

Negligence in mail arrangements or prison activities or the like may be one thing; quite another, as the Baker dissent appears to underscore, at least by analogy, is the failure by officers and employees of the kind charged here --- while each is supposedly knowledgeable of the terrible consequences of any error involved in arrest activities. The Respondents' reliance on Baker not only emphasize our points; Parratt may well confirm them.

III.

Presumably because they knew that the critical document which guided the proceedings at issue here --- the Pre-Trial Order signed by the Court --- covered every claim raised in the Petition with precision (including negligence and 42 U.S.C. § 1983 against the officer although dropped against the Bank, 42 U.S.C. § 1985 against both and 42 U.S.C. § 1988 against both) --- the Respondents in their Brief in Opposition do not mention, but attempt only by omission or largely by negatives, to imply that perhaps those issues were not raised. Fortunately, they do, however, finally touch them, except for the officer's liability under § 1983.

The Pre-Trial Order, signed by the Court, filed on January 19, 1974, referred to repeatedly in our Petition and appearing at App. 51-58 to our Petition and at R. 571 in the record, states this in its opening portion:

"(captioned omitted)

PRE-TRIAL ORDER (R. 571)

1. The plaintiff's statement of facts and contentions with respect to all defendants are as follows: The plaintiff, George Clipper, brings these actions, now consolidated, for compensatory and punitive damages against the defendants based on federal jurisdiction and diversity jurisdiction and under the Constitution of the United States and pursuant to Title 42 U.S.C. Section 1981 through 1988 and Title 28 U.S.C. Sections 1331, 1332, and 1343, and as to the defendant bank, which is a federally chartered institution, pursuant to applicable federal laws pertaining to it. The suit for such damages is based on alleged willful, negligent and unconstitutional wrongs violating Mr. Clipper's constitutional rights and injuring, invading or impairing his right and interest in being free from restraint and bodily interference. Mr. Clipper claims that he was wrongfully arrested, imprisoned and confined by the defendants or at their instigation and as a result of their conspiracy; and that they acted without probable cause and in bad faith and with malice and out of racial motivation; and that they failed to correct the wrongs when able to do so; and each acted for the other. (C.A.App. 98; R. 571) As a result Mr. Clipper asserts that their actions constitute violations of his constitutional

rights, the Civil Rights Acts and constitute the common law torts of false arrest, false imprisonment and malicious prosecution. Further and without regard to the intentional wrongs he has alleged and asserts negligent wrongs in this regard resulting in his wrongful arrest and confinement and wrongful charges and prosecution, and the negligent failure to prevent or end the same. (Emphasis added to show §§ 1983, 1985-6, and 1988 guided the trial as did negligence, after Takoma Park was dismissed.)

The claims of the plaintiff in this regard are against each of the defendants, National Permanent Federal Savings and Loan Association, the bank involved, and Grant A. Starkey, the police officer involved. (Former defendant Prince George's County was dismissed by stipulation upon specific representations of its non-involvement; and the court granted a summary judgment to defendant Takoma Park, Maryland.) (Emphasis added.)

The remainder of the pre-trial Order, including a portion inadvertently omitted from the Appendix to the Petition following the above, is even more specific about negligent acts before arrest and might therefore be further examined (at

Reply Apx., 1-6). It even reflects the Respondents' defense of no "negligent invasion of Mr. Clipper's rights." (Reply Apx., at 4.)

The implications, by indirection, in the Brief in Opposition that neither negligence nor § 1988 was involved by referring to the Complaint and not the Pre-Trial Order is therefore specious, wholly apart from the fact that those elements are clear allegations in that first pleading. Even if they were not, complaints are amended and it is the Pre-Trial Order that guides the cause under Federal Civil Rule 16.*

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*/ Contrary to the implications, perhaps unintended, that the Complaint did not make these references, the original complaint against both Starkey and the bank, separately filed at first and as the pre-trial order stated later consolidated, specifically alleged that the statutes involved included "42 U.S.C. 1985 et seq." (emphasis added, App. 159 as to the bank, App. 174 as to Starkey) and in four places at least referred to negligent acts by each (e.g., App. 166-167, para. 6 referring to failing or neglecting to take "reasonable action" or "make all reasonable and necessary factual investigation" regarding the charges permitted by "the negligent, willful and wrongful acts of this defendant Bank." See also para. 7, App. 167; App. 170, para. B for same "neglecting" and similarly, as to Starkey at App. 177, 184, para. B; App. 185, para. D).

§ 1983 through § 1988 and negligence claims as to both Respondents not only clearly appear in this pre-trial order (supra and Reply Apx., 1-6), they also do appear in the Complaint as the references footnoted below clearly show.*/ Our regret is only that comments in the Opposition Brief appear to require the record points noted in this Section.

IV.

The writ should issue.

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*/ See App. 159 and 174 referring to 42 U.S.C. 1985 et seq. and negligence found in the Complaint, e.g. App. 166-167, para. 6; para. 7, App. 167; App. 170, para. B; App. 177, 184, para. B; App. 185, para., as just noted.

CONTINUATION OF PRE-TRIAL ORDER
AT R. 571 IN RECORD AND APP. 51-58
TO PETITION, C.A. APP. 98 ET SEQ.

The facts which support these contentions show this: that an arrest of Mr. Clipper was made on May 15, 1971 at the Officers' Mess of the National Naval Medical Center in Bethesda where he held weekend employment; that the arrest was made pursuant to arrest warrants obtained by the defendant Starkey upon his oath; that the defendant Starkey accompanied by Montgomery County Police officers effected the arrest in the evening of Saturday, May 15 at that employment; that Mr. Clipper was brought to the Bethesda Police Station for processing to the Hyattsville Police Station where he remained over the weekend and transferred to the Upper Marlboro jail; that the charges were for assault with intent to kill, kidnapping, armed robbery and bank robbery arising from events taking place at defendant's bank in (C.A. App. 99) Langley Park, Maryland on May 14, 1971 the day before his arrest and confinement; that a bond was set of approximately $125,000; that he remained in the jail for approximately a week until released on the reduced bond of approximately $10,000 put up by his family;* that he was

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* In our Statement of Facts in the Petition the bond was erroneously noted as $1,000.

returned to court at least twice and that those charges remained outstanding until they were dismissed by a 'nol pros' in July 1975; further, that Mr. Clipper did not commit any of the offenses criminally charged nor did he participate in, or was involved in them. It was alleged in the complaint and is undisputed here that two of the individuals involved, namely Garlan Lathan and John David Wood were participants in the robbery and were seized at the scene by the police involved, and particularly Officer Henry Wortman, the arresting officer; and that the third member, first claimed to be Mr. Clipper was, in fact, one Russell Coley who was later apprehended. It is undisputed and stated in the complaint that Garlan Lathan is the son-in-law of the plaintiff and the vehicle used in the robbery was registered in Mr. Clipper's name.

It is the contention of the plaintiff, however, that other circumstances surrounding that registration and as set forth in the complaint and in his testimony show that this did not make out 'probable cause' for his arrest, and in any event the defendants acted negligently in restraining or causing the restraining of his liberty. In this regard plaintiff asserts that it appears that the defendants were told where Mr. Clipper was at the time of the events and made no effort to verify his contentions; that Lathan had told them he had not seen (C.A. App. 100) Mr. Clipper and that Mr. Clipper was not involved; that

Officer Wortman who was the arresting officer told them Mr. Clipper was not involved and put them on such notice some 24 hours before Mr. Clipper was arrested; that there were pictures showing the true culprit (Mr. Coley) which either were intentionally or negligently not looked at and would have shown that any identification of Mr. Clipper was wrongful; that the defendants concealed or failed to notify others of the efficacy of the bank camera and pictures; that the defendants (or the authorized employees of the bank and defendant Starkey) actually knew their alleged 'identifications' of Mr. Clipper both before and after the arrest, confinement and bringing of and continuing of the charges; or they acted with negligence in making such 'identifications' knowing that they would result in the arrest, confinement* and restraints on Mr. Clipper here involved; and Officer Starkey also knew this and they acted for each other. The plaintiff asserts that these events were racially notivated, that a white man would not have received the same treatment both before and after the infliction of the wrongs and the restraints on his liberty. The willful and negligent wrongs of the employees are imputable to the bank. Further, in addition to the negligence of its employees,

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*Reply Brief App. at 55A. Unfortunately, in the Appendix filed with our Petition, it appears that one section of the Pre-Trial Order, equal to a page, was omitted in the printing. What follows hereafter is that omission, which we append as a supplement to the original record to be inserted as "App. 55A." It is attahced to this Reply.

the bank was negligent in failing to supervise them properly in this matter or set forth proper rules or procedures earlier, including requiring them to examine the bank's camera of the events before making (C.A. App. 101) an identification. The plaintiff denies the defendants acted in good faith. Plaintiff also rests on sum-total of alleged facts to support all claims.

2. The defendants deny that they either willfully or negligently violated the rights of the plaintiff, and they deny that he is entitled to recovery against them for the alleged false arrest, false imprisonment or malicious prosecution, or negligent invasion of his rights or interests. Specifically, defendant bank* further states as follows: (1) that National Permanent's employees did not take any affirmative steps by request, persuasion or otherwise to cause the arrest of the Plaintiff; (2) that National Permanent's employees had no knowledge that their identification was wrong, and they reasonably believed in the truthfulness of their identification; (3) that Plaintiff's race was not a motivating factor behind National Permanent's employees'

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*End of C.A. App. 55A. It will be noted that in the pre-trial order they --- the Respondents --- deny "negligent invasion" of Mr. Clipper's rights or interests.

identification, and they did not seek to injure Plaintiff in any way because of his race; and (4) that none of National Permanent's employees entered into any kind of conspiracy to deprive Plaintiff of any rights he had ... (Omitted are further statements at App. 56-58, which cover the defendants further claims and damages because they are not pertinent to what was raised.)

and restraints on Mr. Clipper were involved; and Officer Starkey also knew this and that they acted for each other. The plaintiff asserts that these events were racially motivated, that a white man would not have received the same treatment both before and after the infliction of the wrongs and the restraints on his liberty. The willful and negligent wrongs of the employees are imputable to the bank. Further, in addition to the negligence of its employees, the bank was negligent in failing to supervise them properly in this matter or set forth proper rules or procedures earlier, including requiring them to examine the bank's camera of the events before making an identification. The plaintiff denies the defendants acted in good faith. Plaintiff also rests on sum-total of alleged facts to support all claims.

2. The defendants deny that they either willfully or negligently violated the rights of the plaintiff, and they deny that he is entitled to recovery against them for the alleged false arrest, false imprisonment or malicious prosecution, or negligent invasion of his rights or interests. Specifically, defendant bank